

TOMMY THOMAS v. SHARIL AB SAMAD

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COURT OF APPEAL, PUTRAJAYA

SUPANG LIAN JCA

FAIZAH JAMALUDIN JCA

AHMAD FAIRUZ ZAINOL ABIDIN JCA

[CIVIL APPEAL NO: W-01(IM)(NCvC)-28-01-2025]

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4 JULY 2025

Abstract – (i) *A judge must be recused from a case if his written grounds for an interlocutory application, such as a striking out application, demonstrates that he has pre-judged the merits of the case, the weight of the evidence, and the credibility of the parties. Such statements give rise to a ‘real danger of bias’, as they show the judge has already formed an opinion on the ultimate issues to be tried, thereby compromising his ability to conduct a fair and impartial trial; and* (ii) *in a striking out application, it is not the role of the court to determine whether the plaintiff has established a prima facie case based on the pleadings and affidavit evidence, nor is it for the court to assess the weight of the evidence presented against the defendant. The consideration for a court, in a striking out application, is whether the plaintiff demonstrates a reasonable cause of action and that the action is not obviously unsustainable.*

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CIVIL PROCEDURE: *Judge – Recusal – Appeal – Dismissal of application to strike out suit – Whether trial judge pre-judged merits of case, weight of evidence and credibility of parties – Whether facts and circumstances in trial judge’s grounds of judgment revealed bias – Whether gave rise to ‘real danger of bias’ – Whether trial judge ought to be recused*

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CIVIL PROCEDURE: *Striking out – Application – Dismissal of application to strike out suit – Appeal – Whether trial judge pre-judged merits of case, weight of evidence, and credibility of parties – Whether such considerations required in striking out application – Whether trial judge conducted analysis of elements under limbs (b), (c) and/or (d) of O. 18 r. 19(1) of Rules of Court 2012*

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The respondent was arrested by the Malaysian Anti-Corruption Commission (‘MACC’) and charged at the Sessions Court, pursuant to s. 4(1)(a) of the Anti-Corruption Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (‘AMLA’), for his failure to declare to the Inland Revenue Board, the sum of RM1 million that he received in 2013, in breach of s. 113(1) of the Income Tax Act 1967. The appellant was the Attorney General (‘AG’)/Public Prosecution (‘PP’) during this period.

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- A Following his resignation as AG/PP, he published an autobiography ('book'), which detailed, *inter alia*, the decisions and actions he made and took during his tenure as the AG/PP. The prosecution commenced a criminal trial against the respondent at the High Court. However, upon application by the prosecution, the trial judge ordered a discharge not amounting to acquittal as the evidence showed that the investigation against the respondent was incomplete at the time of his arrest and charge. Following his acquittal, the respondent commenced an action at the High Court against, *inter alia*, the appellant ('Suit 86'). The respondent pleaded in his statement of claim ('SOC') several revelations made by the appellant in his book to support his allegations of improper motives and bad faith in the appellant's decision to charge him. The appellant applied to strike out Suit 86 but the application was dismissed and the High Court Judge's ('HCJ') reasons for the dismissal were found in Her Ladyship's grounds of judgment ('encl. 13 GOJ'). The appellant proceeded to file a recusal application of the HCJ but the same was dismissed. Hence, the present appeal. The issue that arose for determination was whether the facts and circumstances in encl. 13 GOJ gave rise to 'a real danger of bias'.
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Held (allowing appeal)

Per Faizah Jamaludin JCA delivering the judgment of the court:

- E (1) In comparing what was pleaded by the respondent in the SOC and what the HCJ said about the aspects of the book that the respondent had highlighted in his pleadings, the HCJ had summarised the respondent's pleadings as regards the book in Her Ladyship's own words, rather than reproduce the respondent's pleadings, as regards the book, in the SOC.
- F From Her Ladyship's summary of the respondent's pleadings as regards the book, the HCJ concluded that the statements made by the appellant in his book 'lend substantial credence to the plaintiff's claim of malicious prosecution'. (para 29)
- G (2) The statements made by the HCJ, in paras. 28 and 29 of encl. 13 GOJ, appeared to support the allegation that the HCJ had formed the opinion that the appellant's decision to prosecute the respondent was influenced by improper motives and political considerations, with an intention to tarnish the respondent's reputation, rather than by merits. Further, the HCJ's statement in para. 30 of encl. 13 GOJ supported the allegation that Her Ladyship had predetermined the weight of the evidence against the appellant even before the trial. (paras 48 & 49)
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- I (3) In considering the appellant's striking out application, under O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 ('ROC'), all the HCJ had to decide was whether the respondent's case against the appellant, based on the pleadings and the affidavit evidence, was

obviously unsustainable; was scandalous, frivolous or vexatious; may prejudice, embarrass or delay a fair trial, and/or was an abuse of the process of court. Although the HCJ made a statement in para. 32 of encl. 13 GOJ, that 'the claim is not obviously unsustainable, vexatious or an abuse of process', an objective reading of the judgment showed that Her Ladyship did not conduct an analysis of the elements under limbs (b), (c) and/or (d) of O. 18 r. 19(1) of the ROC.

- (4) The HCJ's findings and observations in the encl. 13 GOJ (i) were not what was required of a judge in a striking out application. They revealed the HCJ's views on the merits of the respondent's case and the weight of the evidence against the appellant; and (ii) affirmatively answered the test for real danger of bias by the HCJ. The decision of the High Court was set aside. The HCJ was ordered to be recused from hearing all future proceedings and the trial in Suit 86. (paras 50, 51 & 54)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (*refd*)

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC (*refd*)
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC (*refd*)

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC (*refd*)
Mohamad Izaham Mohamed Yatim v. Norina Zainol Abidin & Ors [2015] 7 CLJ 805 HC (*refd*)

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 FC (*refd*)
Reg v. Bow Street Magistrate, Ex p Pinochet (No. 2) (HL (E)) [2000] 1 AC 119 (*refd*)
Tractors Malaysia Bhd v. Tio Chee Hing [1975] CLJU 133; [1975] 1 LNS 133 (*refd*)

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 4(1)(a)

Courts of Judicature Act 1964, s. 68

Income Tax Act 1967, s. 113(1)(a)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

For the appellant - Alan Adrian Gomez, Mervyn Lai Wei Shiung & Haikaldin Mahyidin; M/s Tommy Thomas

For the respondent - Firoz Hussein Ahmad Jamaluddin, Syahrul Syazwan Salehin, Iqbal Harith Liang Danial Liang & Muhammad Firdaus Danial Tan; M/s Fahri, Azzat & Co

[Editor's note: *For the High Court judgment, please see Tommy Thomas v. Sharil Ab Samad* [2025] CLJU 1588 (overruled).]

Reported by Najib Tamby

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JUDGMENT**Faizah Jamaludin JCA:****Introduction**

B [1] This is an appeal by the appellant against the decision of the learned High Court Judge in dismissing his application (encl. 48) for the learned judge to recuse herself from hearing any proceedings and acting as trial judge in the respondent's civil action against him in Civil Suit No. WA-21NCVC-86-12/2023 ("Suit 86") ("recusal application").

C [2] The respondent's suit against the appellant and the other defendants in Suit 86 is for, among others, malicious prosecution and the tort of misfeasance in public office, arising from his arrest and charge for money laundering offences under s. 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA"). The charge was preferred against him by the appellant in D January 2020, when the appellant was the Attorney General and Public Prosecutor ("AG/PP") of Malaysia.

E [3] The appellant being dissatisfied with the learned High Court Judge's refusal to recuse herself, seeks this court to allow the appeal and order the recusal of the learned High Court Judge from hearing all proceedings and the trial in Suit 86.

Background Facts

F [4] The respondent is a member of United Malays National Organisation ("UMNO") and was the elected member of the Johor Bahru Parliamentary constituency in the State of Johor for six non-consecutive terms (1978 to 1990, 2004 to 2018). He was UMNO Johor Bahru's Division Head from 1980 to 1990 and 2000 to 2023. During his tenure as a Member of Parliament, the respondent held several Ministerial positions in the years between 1980 to 2009. The respondent was the Chairman of FELDA from G January 2017 to May 2018.

H [5] The respondent was arrested by the Malaysian Anti-Corruption Commission ("MACC") and charged in the Kuala Lumpur Sessions Court in January 2020 under s. 4(1)(a) of the AMLA for his failure to declare to the Inland Revenue Board the sum of RM1,000,000 he received in 2013, in breach of s. 113(1)(a) of the Income Tax Act 1967.

I [6] The appellant was the AG/PP from June 2018 to February 2020. He was appointed by the Pakatan Harapan ("PH") government as the AG/PP following Barisan Nasional's defeat at the 14th General Election in May 2018. The appellant resigned from his position as AG/PP on 28 February 2020.

[7] In 2021, the appellant published his autobiography titled “*My Story – Justice in the Wilderness*”. The book details, among others, the decisions he made and the actions he took during his tenure as AG/PP. A

[8] The prosecution commenced the criminal trial against the respondent at the Kuala Lumpur High Court in July 2022. After 22 witnesses were called, the Deputy Public Prosecutor (“DPP”) in July 2023 applied for a discharge not amounting to acquittal because the evidence showed that the investigation against the respondent was incomplete at the time of his arrest and charge – the investigating officer (SP-22) admitted during the trial that the respondent was charged based on incomplete investigation papers. After hearing the submissions of the DPP and defence counsel, the learned trial judge ordered a discharge amounting to acquittal of the respondent. B C

[9] Following his acquittal, the respondent in December 2023 commenced Suit 86 against the appellant, Latheefa Koya, the MACC and the Government of Malaysia in respect of his arrest by the MACC and the charge. D

[10] The respondent pleaded in the statement of claim several revelations made by the appellant in the book to support his allegation of improper motives and bad faith in the appellant’s decision to charge him.

[11] In February 2024, the appellant filed an application (encl. 13) under O. 18 r. 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 (“ROC 2012”) to strike out Suit 86. After hearing both parties, the High Court dismissed the striking out application. The learned judge’s reasons for dismissing the application are found in her grounds of judgment dated 3 July 2024 (“encl. 13 GOJ”). Her Ladyship proceeded to set the dates for the full trial of Suit 86 before her on 9 to 10 March 2026 and 27 to 29 April 2026. E F

[12] In August 2024, the appellant filed the recusal application of the High Court Judge. The hearing of the recusal application took place on 9 December 2024, with judgment reserved to 14 January 2025. The learned High Court Judge dismissed the appellant’s application with costs of RM20,000 on 14 January 2025, providing her full reasons for the dismissal in her grounds of judgment dated 9 December 2024 (“encl. 48 GOJ”). G

The Appellant’s Case

[13] The appellant says that he was compelled to file the recusal application against the learned High Court Judge because of the findings made by the learned judge in the encl. 13 GOJ – specifically, the learned judge’s finding that the appellant in his book had: (i) acknowledged that he had a role in toppling the Barisan Nasional government; and (ii) admitted that he had pressured the MACC to investigate the respondent’s role in FELDA and FELCRA for purported wrongdoings. H I

A [14] The appellant contends that he did not make such acknowledgment or admission in the book. He stated in para. 19 of his affidavit in support of the recusal application that the learned judge had made a “quantum leap” in deciding that the respondent “had established *prima facie* of improper motives and bad faith in the prosecution against him”.

B [15] The appellant submits that the learned judge in the encl. 13 GOJ had: (i) made determination of facts that were not supported by the evidence and went beyond the respondent’s pleadings; (ii) failed to address critical submissions made by the appellant’s counsel; and (iii) made unsubstantiated determinations on the merits of the case in Suit 86. The appellant contends that, for these reasons, the learned judge has predetermined Suit 86 against him, and that he will not get a fair trial before Her Ladyship.

C [16] The critical submissions by the appellant’s counsel, which the appellant contends the learned judge failed to address in the encl. 13 GOJ are the fact that the criminal trial against the respondent was commenced by his successor, Tan Sri Idrus Harun, and not by him; and the case of *Mohamad Izaham Mohamed Yatim v. Norina Zainol Abidin & Ors* [2015] 7 CLJ 805; [2017] 7 MLJ 772; [2015] 5 AMR 867, where the High Court held that the civil tort of malicious prosecution is not an after-the-fact judicial review of the PP’s exercise of prosecutorial discretion and it is not exercise to find fault in the manner in which the prosecution was conducted.

E [17] The appellant maintains that the Her Ladyship’s finding in para. 19 of the encl. 13 GOJ that upon examining the statement of claim, “this court is satisfied that the essential elements of malicious prosecution have been properly particularised”, is an unsubstantiated determination by the learned judge on the merits of the respondent’s case in Suit 86.

F [18] Learned counsel for the appellant submits that the learned judge’s finding in para. 19 of the encl. 13 GOJ even though that the respondent did not plead the essential element of malicious prosecution, *ie*, that the appellant had “no reasonable or probable cause” for charging the respondent, was a clear error by the learned judge.

G [19] It is the appellant’s case the alleged errors and the unsubstantiated and unpleaded determinations made by the learned judge in the encl. 13 GOJ, shows that there is a real danger of bias on the part of the learned judge and a likelihood that he will not get a fair trial before the said learned judge.

H The Respondent’s Case

I [20] The respondent’s case is that the learned judge rightly dismissed the recusal application in encl. 48 because: (i) it was an attempt by the appellant to bypass the amendment to s. 68 of the Courts of Judicature Act 1964, which bars appeals against the High Court’s dismissal of striking out

applications, and to assail the judge's findings in dismissing encl. 13; (ii) the appellant did not show there was real danger of bias – he did not prove that the learned judge had proprietary or pecuniary interest, or prejudgment against the appellant in the encl. 13 GOJ; and (iii) the recusal application cannot be made solely based on grievance with findings within a judgment; and (iv) even if the judge held a preconceived opinion against the appellant, which the respondent does not concede, such reason is insufficient to justify the recusal of the judge.

The Law On Recusal Of A Judge

[21] Our decision, whether to allow or dismiss this appeal, hinges on the single question of whether there is a real danger of bias by the learned High Court Judge based on the facts and circumstances of the case.

[22] The law is settled that the applicable test for the recusal of a judge is the “real danger of bias test” formulated by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1; [1999] 3 AMR 3529, and *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701; [2002] 1 MLJ 321; [2001] 4 AMR 4605.

[23] The Federal Court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577; [2006] 2 MLJ 293; [2006] 2 AMR 549 held that, pursuant to the principle of *stare decisis*, the real danger of bias test for the recusal of judges promulgated by the Federal Court in *Majlis Perbandaran Pulau Pinang* and *Mohamed Ezam*, are binding on all inferior courts including this court.

[24] The Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501; [2007] 4 AMR 736 acknowledged that real danger of bias of a judge may arise when delivering judgment. Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the Federal Court said:

[70] ... The crucial point in determining the presence of bias is to objectively enquire *whether the facts and circumstances asserted to be evidence of bias affirmatively answer the test for real danger of bias as formulated by this court.*

...

[72] In other words *the question is whether the allegation and the factual circumstance could have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias'* (see: *Alor Jangus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [2002] 4 CLJ 268; *Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor* [2000] 1 All ER 65)

(emphasis added)

- A [25] Thus, based on the test for real danger of bias formulated by the Federal Court, this court in determining whether there is a presence of bias must objectively enquire whether the facts and circumstances asserted to be evidence of bias affirmatively answer the test for real danger of bias. The test is “whether the allegation and the factual circumstance could have caused a
B fair-minded and informed bystander to entertain a fear of real danger of bias”?.

Analysis

- C [26] In his affidavit in support of the recusal application, the appellant averred that the learned High Court Judge made unsubstantiated findings in the encl. 13 GOJ, where he stated the following:

11 ... It is clear to me that Her Ladyship had predetermined the Suit against me. Numerous unsubstantiated findings, contradicting the pleadings and the evidence before Her Ladyship, were made by Her Ladyship. I say for the following reasons:

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Unsubstantiated Determinations

12. In Paragraphs 27 and 28 of the Written Grounds, (Her Ladyship) determined as follows:

- E [27] The book published by the first defendant, title “*My Story – Justice in the Wilderness*” greatly features in this case. It plays a significant role in the plaintiff’s contention of malicious prosecution. The plaintiff has relied on several statements and admissions made by the first defendant in the book to establish a
F *prima facie* case of improper motives and bad faith in the prosecution against him. Specifically, the plaintiff highlighted the following aspects from the book:
- (i) the first defendant’s admission that he remained a “political lawyer” throughout his career, the plaintiff suggested a lack of impartiality.
 - G (ii) the first defendant’s account on how he lobbied various political and legal figures to be appointed as Attorney General – the plaintiff viewed it as an indication of a political agenda.
 - (iii) the first defendant’s acknowledgement of his role and efforts to topple the Barisan Nasional government, which the plaintiff was a part of, the plaintiff maintained revealed a potential bias of the
H first defendant against the plaintiff.
 - (iv) most critically, the first defendant’s statements about pressuring the MACC to investigate the plaintiff’s role in FELDA and FELCRA for purported wrongdoings, even after being told there was no evidence of any scandal. This suggests a targeted and predetermined effort to find wrongdoing by the plaintiff.
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[28] These published statements, made by the first defendant himself for public consumption, lend substantial credence to the plaintiff's claim for malicious prosecution. The plaintiff in his pleadings painted a picture of an Attorney General who was not objective and neutral, but one who was actively seeking to uncover wrongdoings by political opponents through the use of prosecutorial power. On the surface, the first defendant's own words in the book gave context and meaning to his subsequent actions in charging the plaintiff despite incomplete investigations. They supported the inference that the prosecution was not driven by the merits of the case, but by extraneous political considerations and a desire to tarnish the plaintiff ...

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[27] The appellant contends that the aforementioned passages in paras. 27 and 28 of the encl. 13 GOJ are not true because he did not write in the book that he had a role in toppling the Barisan Nasional government or that he had pressured the MACC to investigate the respondent's role in FELDA and FELCRA for purported wrongdoings. The appellant said the respondent was not mentioned nor was his prosecution discussed in the book.

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[28] In analysing whether the facts and circumstances asserted by the appellant, *ie*, para. 27 and 28 of the encl. 13 GOJ, to be evidence of bias on the part of the learned judge, it is necessary to reproduce the whole of para. 28 – the appellant had only produced part of para. 28 of the encl. 13 GOJ in his affidavit in support. The whole of para. 28 is reproduced below (the words underlined were not reproduced by the appellant in his affidavit):

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[28] These published statements, made by the first defendant himself for public consumption, lend substantial credence to the plaintiff's claim for malicious prosecution. The plaintiff in his pleadings painted a picture of an Attorney General who was not objective and neutral, but one who was actively seeking to uncover wrongdoings by political opponents through the use of prosecutorial power. On the surface, the first defendant's own words in the book gave context and meaning to his subsequent actions in charging the plaintiff despite incomplete investigations. They supported the inference that the prosecution was not driven by the merits of the case, but by extraneous political considerations and a desire to tarnish the plaintiff. *This squarely fits the legal definition of malicious prosecution – the abuse of criminal process for purposes other than the proper administration of justice. It is well established that proof of malice need not be direct, but can be inferred from the circumstances pointing to the misuse of prosecutorial power. As stated in Mahan Singh Karam Singh v. Chanan Singh Sher Singh [1956] 1 WLR 781:*

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... Malice in the widest and vaguest ... sense is proved if the prosecution was instituted for some other and improper motive and not to secure the ends of justice.

(emphasis added)

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A [29] In comparing what was pleaded by the respondent in the statement of claim and what the learned judge said about the aspects of the book that the respondent had highlighted in his pleadings, we note that the learned judge had summarised the respondent's pleadings as regards the book in her own words, rather than reproduce the respondent's pleadings as regards the book in the statement of claim. From her summary of the respondent's pleadings as regards the book, the learned judge concluded that the statements made by the appellant in the book "lend substantial credence to the plaintiff's claim of malicious prosecution".

C [30] The respondent had pleaded in para. 39 of the statement of claim the following as regards what was written by the appellant in his book:

(e) Pendedahan Mengejutkan Tommy Thomas Dalam Buku "*My Story: Justice In the Wilderness*"

D 39. Semasa pendakwaan kes Plaintiff sedang berlangsung, Tommy Thomas telah meletakkan jawatan selaku Peguam Negara lantaran pertukaran Kerajaan dan selepas itu menukil sebuah buku bertajuk "*My Story: Justice In the Wilderness*" Dimana beliau, antara lainnnya menzahirkan kepada seluruh dunia bahawa:

E (a) Beliau adalah peguam politik yang "have remained a political lawyer throughout my career";

(b) Ibu-bapa beliau berkhidmat sebagai kakitangan Kerajaan tetapi tidak begitu menyokong polisi Kerajaan pada ketika itu dan beliau tidak mengundi kerana "electoral system was so gerrymandered that Barisan was voted in, general election after general election";

F (c) Beliau mengharap dan bercita-cita untuk menjadi Peguam Negara. Beliau berusaha bertemu dengan beberapa tokoh politik (termasuk Karpal Singh dan Tun Dr Mahathir) serta beberapa peguam (termasuklah Zainur Zakaria, Ambiga dan Tun Salleh Abas) untuk melobi menjadi Peguam Negara;

G (d) Beliau memberikan khidmat untuk menjatuhkan Kerajaan yang memerintah sebelum beliau dilantik sebagai Peguam Negara "The much-vaunted Barisan Nasional coalition, which had governed Malaysia continuously for an unbroken duration of sixty-one years, was on the verge of defeat. History was being made, and we were very much part of it";

H (e) Pada malam selepas mesyuarat "Presidential Council Pakatan Harapan"; Tan Sri Lim Kit Siang telah menghubungi beliau untuk tujuan memaklumkan perlantikannya sebagai Peguam Negara yang baru;

I (f) Semasa menjadi Peguam Negara, beliau telah menyelidik dan mendesak agar kertas siasatan dimajukan SPRM berhubung skandal membabitkan; antaranya, Felda dan Felcra. Namun beliau

dimaklumkan oleh agensi penyiasatan bahawa tiada skandal yang dijumpai membabitkan Felda (Plaintif pernah menjadi Pengerusi Felda dari 6/1/2017 - 4/5/2018) dan Felcra;

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- (g) Beliau tidak berpuas hati dengan jawapan itu lalu meminta Perdana Menteri pada masa yang material yakni Tun Dr Mahathir Mohamed mempengerusikan satu mensyuarat yang dihadiri Ketua Polis Negara dan SPRM untuk mendapatkan maklumat berkenaan status skandal dalam Felda namun SPRM memberikan jawapan yang sama. Tidak berpuashati dengannya, beliau mendesak agar diadakan “speedier and more thorough investigation”; dan

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- (h) Plaintif (yang merupakan bekas pengerusi Felda) telah didakwa di Mahkamah pada Januari 2020 atas pertunjukan jenayah di bawah AMLA kerana kononnya tidak mengisytiharkan RM1 juta yang diterima sebagai pendapatannya bagi tahun 2013 dalam Borang Nyata Cukai Pendapatan berkaitan. Butiran terperinci pertuduhan adalah dalam pengetahuan Tommy Thomas dan SPRM.

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[31] The particulars of malicious investigation, wrongful arrest and malicious prosecution were pleaded by the respondent in para. 42.1(a) – (i) of the statement of claim.

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[32] The particulars against the appellant are in para. 42.1(f), (g) and (i), which are reproduced below:

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- (f) Tommy Thomas selaku AG pada masa itu, apabila dirujuk dengan kertas siasatan yang belum lengkap telah dengan sengaja gagal dan/atau enggan untuk mengarahkan/meminta siasatan dilengkapi sebelum memutuskan untuk memberi izin mendakwa;
- (g) Tommy Thomas selaku AG pada masa itu, telah mengeluarkan izin mendakwa sekalipun kertas siasatan yang dikemukakan kepadanya masih belum lengkap;
- (i) SPRM di bawah kawalan Latheefa dan Tommy Thomas dengan niat jahat mendakwa Plaintif walaupun kertas siasatan masih belum lengkap.

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[33] Reading the particulars of the malicious investigation, wrongful arrest and malicious prosecution pleaded by the respondent in para. 42.1 of the statement of claim, it is apparent that the allegations against the appellant were in relation to the appellant’s decision to issue the “izin mendakwa” and to charge the respondent before the investigation papers were complete. The particulars, as pleaded, did not refer to the statements made by the appellant in his book. The pleading in para. 39 of the statement of claim was a narrative of what the respondent said the appellant had revealed in his book.

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[34] However, the learned judge in her summary of the aspects of the book in para. 27 of the encl. 13 GOJ:

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- (i) stated in item (a) that the respondent had suggested a lack of impartiality by reason of the appellant’s admission that he remained a political lawyer throughout his career.

- A We note the respondent did not plead lack of impartiality in his pleading of the particulars of the book or in the particulars of malicious prosecution against the appellant;
- (ii) stated in item (b) that the respondent viewed as an indication of political agenda of the appellant's account in his book of how he lobbied various political and legal figures for the appointment as AG/PP;
- B We note that the respondent did not plead the fact that the appellant had lobbied for the post of AG/PP was an indication of a political agenda of his investigation, arrest and charge of the respondent;
- C (iii) stated in item (c) that the respondent had in the pleadings, highlighted the appellant in the book had acknowledged his role in "the efforts to topple the Barisan Nasional government", which the respondent maintained revealed a potential bias by the appellant against the respondent.
- D However, what the respondent had pleaded in para. 39(d) of the statement of claim was, "Beliau memberikan khidmat untuk menjatuhkan Kerajaan yang memerintah sebelum beliau dilantik sebagai Peguam Negara". Additionally, the respondent did not plead that this revealed a potential bias by the appellant against the respondent; and
- E (iv) stated in item (d) that the respondent had highlighted that the appellant's statement about pressuring the MACC to investigate the respondent's role in FELDA and FELCRA for purported wrongdoings, even after being told there was no evidence of any scandal, suggest a targeted and predetermined effort to find wrongdoing by the respondent.
- F We note that nowhere in the book was the respondent's name mentioned. In addition, the respondent did not plead that the appellant had pressurised the MACC to investigate the respondent's role in FELDA and FELCRA, or that it suggests a targeted and predetermined effort to find the respondent's wrongdoings.
- G [35] On the appellant's contention that the learned judge fell into error, when she found that the respondent had pleaded the appellant had "no reasonable or probable cause" for charging the respondent, which is an essential element of malicious prosecution, upon perusing the statement of claim, we agree with the appellant that the respondent did not plead that the appellant had charged him for the money laundering offence under AMLA with "no reasonable or probable cause". As discussed in para. [33] above, the particulars of the malicious investigation, wrongful arrest and malicious prosecution, pleaded by the respondent against the appellant, was the appellant's decision to charge the respondent and issue the "izin mendakwa" before the investigation against him was complete.
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[36] In addition, we agree with the appellant that the learned judge's statement in para. 27(d) of the encl. 13 GOJ that the respondent had highlighted in the statement of claim the appellant's revelation in the book that he had pressured the MACC to investigate the respondent's role in FELDA and FELCRA for purported wrongdoings, was in error. This is because the appellant did not mention the respondent in his book – a fact that was admitted by the respondent in para. 11.4 of his affidavit in reply opposing the recusal application. What the appellant had stated in his book in respect of FELDA and FELCRA was that he had “urged speedier and more thorough investigation” against FELDA, FELCRA and MARA by the MACC at a meeting that he requested, which was chaired by the Prime Minister and attended by him, the IGP and the MACC's director.

Issue: Is There A Real Danger Of Bias?

[37] The issue for our determination is whether the facts and circumstances in the encl. 13 GOJ, alleged by the appellant to be evidence of bias on the part of the learned judge, give rise to “a real danger of bias”.

[38] The Federal Court in *Metramac Corporation (supra)* held that the appearance of bias is just as important as actual bias in determining whether there is a real danger of bias. It cited with approval the statement made by Lord Nolan in *Reg v. Bow Street Magistrate, Ex p Pinochet (No. 2)* (HL (E) [2000] 1 AC 119 at p. 139 that:

... in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.

[39] Nevertheless, the Federal Court in *Metramac Corporation* did caution that any allegation of real danger of bias based on a judgment should not be readily entertained by the appellate court. Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the Federal Court said:

[73] But we hasten to add that any allegation of real danger of bias based on a judgment delivered should not be readily entertained by an appellate court. The reason is simple. A losing party would only be too willing to allege bias. This might be what was referred to during the submission before us as ‘opening the floodgates’ if the present appeal were to be entertained readily. Thus, we would therefore think that unless there exists in reality remarks and statements in the judgment delivered indicating on the face of the record a real danger of bias such allegation should be rejected summarily. In this way it will ‘avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias’. (See: *Majlis Perbandaran Pulau Pinang v. Sykt. Berkerjasama Serbaguna Sungai Gelugor (supra)*).

[40] Based on the test formulated by the Federal Court on whether there is a real danger of bias by the learned High Court Judge, we have to decide whether “the allegation of bias and the factual circumstance could have caused a fair-minded and informed bystander to entertain a fear of real danger of bias”.

A [41] In order to answer the question in the said “real danger of bias” test, we read the pleadings in Suit 86, both parties’ affidavits, the pages of the appellant’s book exhibited in his affidavit, and the learned judge’s judgment in the encl. 13 GOJ, in order to inform ourselves of the facts and circumstances relating to the allegation of bias, and having being so
B informed, we had put ourselves in the shoes of a “fair-minded and informed bystander”.

[42] As discussed above, we found that the learned judge’s finding that the statement published in the appellant’s book lent “substantial credence to the respondent’s claim of malicious prosecution”, was neither based on what was
C actually written by the appellant in the book nor on what was actually pleaded by the respondent in respect of the book in the statement of claim. Instead, it was based on the learned judge’s own summary and her view of the particulars pleaded by the respondent. She had also erroneously found that the respondent had pleaded the essential element of malicious
D prosecution, namely “no reasonable or probable cause” for preferring the charge against the respondent, when in fact it was not pleaded in the statement of claim.

[43] We are cognisant of the respondent’s argument that the findings by the learned judge in the encl. 13 GOJ was only that the respondent, *inter alia*,
E has made a *prima facie* case of malicious prosecution and abuse of power against the appellant and for this reason the respondent’s action in Suit 86 should not be struck out summarily.

[44] Nonetheless, we are guided by the long-established legal principle that in a striking out application, it is not the role of the court to determine
F whether the plaintiff has established a *prima facie* case based on the pleadings and affidavit evidence, nor is it for the court to assess the weight of the evidence presented against the defendant. The consideration for a court in a striking out application is whether the plaintiff demonstrates a reasonable cause of action and that the action is not obviously unsustainable.

G [45] The law is settled that the test for striking out a claim is not the respective merits of the claim but whether the pleadings disclose some cause of action or raise some question fit to be decided by a judge. The fact that the plaintiff’s case is weak is not a reason for a court to strike out the pleadings. It is only cases, which are obviously unsustainable that may be
H struck out summarily under O. 18 r. 19(1)(a), (b), (c) and/or (d) ROC 2012: see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36; [1993] 2 AMR 1969.

I [46] The threshold to dismiss a striking out application is relatively low – courts recognise that the power to summarily strike out a case without permitting the plaintiff to proceed to trial is a drastic power and should be

exercised with caution: per Lord Diplock in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] CLJU 133; [1975] 1 LNS 133; [1975] 2 MLJ 1; [1975] 1 MLRA 106, PC.

[47] Thus, in considering the appellant's striking out application under O. 18 r. 19(1)(a), (b), (c) and/or (d) ROC 2012, all the learned judge had to decide was whether the respondent's case against the appellant based on the pleadings and the affidavit evidence was obviously unsustainable; was scandalous, frivolous or vexatious; may prejudice, embarrass or delay a fair trial, and/or an abuse the process of court. Although, the learned judge made a statement in para. 32 of the encl. 13 GOJ that, "the claim is not obviously unsustainable, vexatious or an abuse of process", an objective reading of the judgment shows that she did not conduct an analysis of the elements under limbs (b), (c) and/or (d) of O. 18 r. 19(1) ROC 2012. (para 47)

[48] As an informed and fair-minded bystander, we find that the statements made by the learned judge in para. 28 and 29 of the encl. 13 GOJ (reproduced below) appear to support the allegation that the learned judge had formed the opinion that the appellant's decision to prosecute the respondent was influenced by improper motives and political considerations, with an intention to tarnish the respondent's reputation, rather than by merits.

[28] ... On the surface, the first defendant's own words in the book gave context and meaning to his subsequent actions in charging the plaintiff despite incomplete investigations. They supported the inference that the prosecution was not driven by the merits of the case, but by extraneous political considerations and a desire to tarnish the plaintiff ...

[29] The first defendant's own admissions in his book constitute *prima facie* evidence of such improper motives. The fact that these statements were voluntarily published by the first defendant himself significantly bolsters their reliability and weight in supporting a finding of malice ...

[49] Furthermore, in our view the learned judge's statement in para. 30 of the encl. 13 GOJ supports the allegation that the learned judge had predetermined the weight of the evidence against the appellant even before the trial. Paragraph 30 of the GOJ is reproduced below:

[30] The first defendant's admissions in the book, together with troubling testimonies of the prosecution's own witnesses during (the criminal) trial, more than meet this threshold. They establish a *prima facie* case that the prosecution was tainted by bad faith and improper motives, rather than based on objective and complete investigations. It would be a travesty for the court to turn a blind eye to such weighty evidence and deny the plaintiff the opportunity to vindicate his claim at trial.

- A [50] The learned judge's findings and observations in the encl. 13 GOJ are not what is required of a judge in a striking out application. They reveal the learned judge's views on the merits of the respondent's case and the weight of the evidence against the appellant.
- B [51] For the reasons discussed above, as an informed and fair-minded bystander, given the facts and circumstances of the allegation of bias, we find that the learned judge's findings and observations in the encl. 13 GOJ do affirmatively answer the test for real danger of bias by the learned judge.
- C [52] In *Dato' Tan Heng Chew (supra)*, the Federal Court held that if it or this court perceives a real danger of bias, given the facts and circumstances of the allegation of bias, even if the High Court Judge believes otherwise, the appeal should be allowed and the judge should recuse himself from hearing the trial and all proceedings in said case. Abdul Hamid Mohamed FCJ (Siti Norma Yaacob CJ (Malaya) concurring) held that the Federal Court, along with this court, are better positioned to evaluate whether there was a real danger of bias by the High Court Judge, *albeit* unintentional. This is because neither the Federal Court nor this court are directly involved in the case before the High Court, we possess the objectivity required for such an assessment. His Lordship said that, given the facts and circumstances of the case, if appellate courts perceive a real danger of bias, even if the trial judge does not share this sentiment, it is advisable, in the interest of justice, for the trial judge to recuse herself.
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Conclusion

- F [53] For the reasons above, based on the facts and circumstances of the allegation of bias and the learned High Court Judge's findings and statements in the encl. 13 GOJ, we perceive that there exists a real danger of bias on the part of the learned High Court Judge.
- G [54] For this reason, we allow this appeal and set aside the decision of the High Court dated 14 January 2025. We order that the learned High Court Judge be recused from hearing all future proceedings and the trial in Suit 86.
- [55] We order costs of RM30,000 here and below, subject to allocator.

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